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82-1264

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF LOUISIANA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

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January 28, 1983

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QUESTIONS PRESENTED

"Curtailment" of natural gas customers occurs when a gas pipeline has inadequate supplies to meet the contract requirements of all of its customers. The pipeline then allocates its supply among its customers according to a "curtailment plan" contained in a tariff on file with the Federal Energy Regulatory Commission.

Section 401 of the Natural Gas Policy Act of 1978 (NGPA) requires that the curtailment tariffs of interstate pipeline companies be amended to protect deliveries to "essential agricultural users" and to "high priority users." The Federal Energy Regulatory Commission (FERC) has issued detailed rules purporting to implement that requirement. The rules also require interstate pipeline companies to use a specific method for allocating gas between (a) customers which have more than one supplier, and (b) customers which depend fully on the curtailing pipeline. That allocation methodology will, when applied to some pipelines, cause the elimination of deliveries to higher priority customers in some regions in order to increase deliveries to lower priority customers in other regions. The FERC rule allows pipelines to file tariffs under Section 4 of the Natural Gas Act which contain differing allocation mechanisms more appropriate to their systems, but the FERC will not allow the implementation of those tariff provisions unless special permission is first sought and obtained from the agency. There is no limit on the period of time the agency may take in acting on a request for such special permission.

The questions presented are:

1. Did the Court of Appeals err in holding that the FERC has general rulemaking powers which allow it to suspend the effectiveness of filed tariffs for an indefinite

period beyond the five month maximum suspension period allowed by the Natural Gas Act?

2. Do the provisions of the NGPA supersede the requirements of Section 4(b) of the Natural Gas Act that curtailment be administered and implemented in a nondiscriminatory manner?

3. Does the requirement of the NGPA that the FERC implement new curtailment priorities override the procedural requirements of the Natural Gas Act for modifying and changing filed curtailment tariffs?

PARTIES TO THE PROCEEDING

The decision below was issued in consolidated appeals from the rulings of three agencies, the Federal Energy Regulatory Commission, the U.S. Department of Agriculture, and the United States Department of Energy. Numerous issues were raised in the consolidated appeals, and there were numerous petitioners and intervenors in the consolidated proceedings. The specific issues presented by this petition were raised in three appeals:

State of Louisiana v. *Federal Energy Regulatory Commission* (No. 79-2297)

State of Louisiana v. *Federal Energy Regulatory Commission* (No. 79-1569)

United Gas Pipe Line Company v. *Federal Energy Regulatory Commission* (No. 79-1813)

A complete list follows of the parties to the consolidated proceedings:

Air Products and Chemicals, Inc.
Alabama Gas Corp.
Allied Chemical Corp.
The American Bakers Ass'n
American Gas Ass'n
American Industrial Clay Co. of Sandersville and Georgia Kaolin Co.
American Meat Institute
American Paper Institute, Inc.
American Seed Trade Ass'n, Inc.
American Sugar Cane League of the USA, Inc.
The American Textile Manufacturers Institute, Inc.
Armour & Company
Atlanta Gas Light Company
Biscuit and Cracker Manufacturing Ass'n
Brooklyn Union Gas Company
Columbia Gas Transmission Corp.
Columbia Nitrogen Corp., and Nipro, Inc.
Consolidated Edison Company of New York

Consolidated Gas Supply Corp.
Corn Refiners Ass'n
DISCUS
The Distilled Spirits Council of the
United States, Inc.
East Tennessee Natural Gas Co.
Eli Lilly and Company
Entex, Inc.
Farmland Industries, Inc.
The Fertilizer Institute
First Mississippi Corp.
Glass Packaging Institute
The Great Western Sugar Co.
High Plains Gas Consumer Group
Kansas-Nebraska Natural Gas Co.
Midwestern Gas Transmission Co.
Mississippi River Transmission Corp.
National Council of Farmers Cooperatives
National Food Processors Association
National Independent Meat Packers Ass'n
National Soybean Processors Ass'n
New Jersey Natural Gas Co.
North Carolina Natural Gas Corp.
Northern Natural Gas Co.
Pacific Gas & Electric Co.
Public Service Commission of the State of New York
Public Service Company of North Carolina, Inc.
Public Service Electric and Gas Co.
The Retail Bakers of America
Riceland Foods
Southern California Gas Co.
Southern Natural Gas Co.
State of Louisiana
State of Oklahoma
State of Texas
Stauffer Chemical Co.
Tennessee Gas Pipeline Co.
Tera Chemicals International, Inc.
Texas Gas Transmission Co.
Transcontinental Gas Pipe Line Corp.
United Distribution Companies

The United States Brewers Association
United States Department of Agriculture
United States Department of Energy
Washington Gas Light Co.
West Texas Gas, Inc.
Willamette Industries, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	2
JURISDICTION	2
STATUTES, REGULATIONS, AND RULINGS INVOLVED	2
STATEMENT OF THE CASE	3
A. The Statutory Scheme Under The Natural Gas Act For Establishing, Enforcing, And Reviewing Curtailments	6
B. The Two Elements Of The Curtailment Tariffs Filed And Implemented Under The Natural Gas Act—An Order Of Priorities And An Allocation Mechanism	8
C. The End Use Requirements Established By Congress In The NGPA	10
D. The Actions Of The FERC To Implement The Secretary's Rule	10
E. Proceedings In The Court Of Appeals	13
REASONS FOR ALLOWING THE WRIT	15
A. The En Banc Ruling Of The D.C. Circuit That The FERC May Use Its General Rulemaking Powers To Extend Indefinitely The Five Month Suspension Period Established By Section 4 Of The Natural Gas Act Conflicts Directly With An Opinion Of The Second Circuit And With Prior Decisions Of The D.C. Circuit, And It Is Inconsistent In Reasoning With Prior Opinions Of This Court On An Important Issue Of Law Affecting The Administration Of At Least Seven Regulatory Statutes.	16
B. The Opinion Of The En Banc Court Below Decides Incorrectly The Important Question Of The Relationship Of The Two Statutes Which Govern Natural Gas Curtailments, And The Resolution Of That Question Will Affect The Gas Supplies And Costs Of Millions Of Gas Consumers Across The Nation.	23
CONCLUSION	26

TABLE OF AUTHORITIES

CASES: Page

Alaska Bulk Carriers Inc. v. *Kreps*, 595 F.2d 814 (D.C. Cir. 1979), *rev'd* 442 U.S. 572 (1979). 22 n.13

American Smelting & Refining Co. v. *Federal Power Commission*, 494 F.2d 925 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 882 (1974) 17 n.11

American Telephone and Telegraph Company v. *FCC*, 487 F.2d 865 (2d Cir. 1973) 18, 19, 21

Arrow Transportation Co. v. *Southern Railway Co.*, 372 U.S. 658 (1963) 17, 20

City of Willcox v. *FPC*, 567 F.2d 394 (D.C. Cir. 1977), *cert. den.* 434 U.S. 1012 (1978) 24

FPC v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972) 6, 16, 24

FPC v. *Texaco, Inc.*, 377 U.S. 33 (1964) 20

Indiana & Michigan Electric Company v. *FPC*, 502 F.2d 336 (D.C. Cir. 1974), *cert. den.* 420 U.S. 948 17

MCI Telecommunications Corp. v. *FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. den.* 434 U.S. 1040 (1978) 17, 19

North Carolina v. *Federal Energy Regulatory Commission*, 584 F.2d 1003 (D.C. Cir. 1973) 8, 9, 14, 24

Pacific Gas & Electric Co. v. *FPC*, 506 F.2d 33 (D.C. Cir. 1974) 20

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 17 n.11, 20, 21

Public Systems v. *FERC*, 606 F.2d 973 (D.C. Cir. 1979) 21

Sebring Utilities Commission v. *FERC*, 591 F.2d 1003 (5th Cir. 1974), *cert. denied*, 444 U.S. 879 (1979) . 24

United States v. *SCRAP*, 412 U.S. 669 (1973) .. 16, 17, 20

Willmut Gas and Oil Company v. *FPC*, 294 F.2d 245 (D.C. Cir. 1961), *cert. den.* 360 U.S. 975 (1962) . 17, 20

STATUTES:

Communications Act, 47 U.S.C. § 204(a), § 205 .. 8, 18, 19

Federal Power Act, 16 U.S.C. § 824e 8

Interstate Commerce Act, 49 U.S.C. §§ 10707, 10708 . 8

Table of Authorities Continued

Page

Department of Energy Organization Act, 42 U.S.C. § 7172 ..... 5 n.3, 14

Natural Gas Act of 1938 § 4, 15 U.S.C. § 717c ..... *passim*

Natural Gas Act of 1938 § 5, 15 U.S.C. § 717d ..... *passim*

Natural Gas Act of 1938 § 16, 15 U.S.C. § 717o 3, 14, 18, 22 n.13

Natural Gas Act of 1938 § 19, 15 U.S.C. § 717r 5

Natural Gas Policy Act of 1978, § 401, 15 U.S.C. § 3391 ..... *passim*

Natural Gas Policy Act of 1978, § 402, 15 U.S.C. § 3392 ..... 21, 22, 23

Natural Gas Policy Act of 1978, § 403, 15 U.S.C. § 3393 ..... 5, 6, 23

Natural Gas Policy Act of 1978, § 501, 15 U.S.C. § 3411 ..... 14, 21, 22, 23

Natural Gas Policy Act of 1978, § 502, 15 U.S.C. § 3412 ..... *passim*,

Natural Gas Policy Act of 1978, § 506, 15 U.S.C. § 3416 5

Postal Reorganization Act of 1970, 39 U.S.C. §§ 3624, 3641 8

Shipping Act, 46 U.S.C. § 817 8

REGULATIONS AND ORDERS:

Order Nos. 29 and 29-C of the Federal Energy Regulatory Commission ..... *passim*

Rules of the Economic Regulatory Administration of the Department of Energy, 10 C.F.R. Part 580 10

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

The State of Louisiana respectfully prays that a writ of certiorari issue to review the judgment and opinion of the D.C. Circuit issued *en banc* in this proceeding on October 1, 1982. In the *en banc* opinion, the D.C. Circuit adopted, as the opinion of the *en banc* court, Part I.C of the Panel's opinion issued July 29, 1981.

Louisiana requests this Court to review only the narrow legal issues decided in Part I.C. of the Panel's opinion (A. 28-35),[1] which was adopted as the opinion of the *en banc* court (A. 116 n. 3).

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[1] Citations to the Appendix (A. ____) are to a separate appendix filed jointly by Louisiana and United Gas Pipe Line Company, which is also petitioning for review of the same portions of the court's opinions.

OPINIONS BELOW

The opinion of the panel of the D.C. Circuit (*Process Gas Consumers Group, et al.* v. *U.S. Department of Agriculture, et al.* (Nos. 79-1336, *et al.*)) was reported in advance sheets at 661 F.2d 1332 but was withdrawn by the court after rehearing *en banc* was granted. The Panel's opinion therefore does not appear in the bound permanent edition of the Federal Reporter.

The *en banc* decision of the court is not yet reported.

The full text of the panel opinion and the *en banc* opinion are set out in the separate appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the D.C. Circuit on rehearing *en banc* was issued October 1, 1982. By order issued December 21, 1982, the Honorable Warren E. Burger, Chief Justice of the United States, extended Louisiana's time for filing its petition for a writ of certiorari to and including January 29, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS, AND RULINGS INVOLVED

The opinion of the court below ruled on issues raised in twenty-three consolidated appeals from rules of the United States Department of Agriculture, the Department of Energy, and the Federal Energy Regulatory Commission. The orders of the three agencies were issued to implement Section 401 of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3391. This petition involves only certain portions of Order Nos. 29 and 29-C, issued by the Federal Energy Regulatory Commission on May 2, 1979 and October 22, 1979. The portions of those orders challenged by Louisiana were affirmed in Part I.C. of the panel's opinion (A. 28-35). Louisiana and United Gas Pipe

Line Company sought rehearing *en banc* of that part of the panel's opinion. The court *en banc* granted rehearing, and, in its opinion on rehearing, adopted Part I.C. of the panel's opinion as the opinion of the *en banc* court (A. 116 n. 3). The agency orders and the opinions of the court are set out in the separately filed Joint Appendix of the State of Louisiana and United Gas Pipe Line Company.

This petition raises issues about the powers of the FERC under Title IV of the Natural Gas Policy Act, 15 U.S.C. §§ 3391 *et seq*, and the relationship of its powers under Title IV to the procedural and substantive requirements of Sections 4, 5, and 16 of the Natural Gas Act, 15 U.S.C. §§ 717c, d, o. The relevant statutory provisions are set out in full in the appendix attached to this petition.

STATEMENT OF THE CASE

This petition requests this Court to review a portion of a decision of the U.S. Court of Appeals for the D.C. Circuit, sitting *en banc*, which affirmed a rule of the Federal Energy Regulatory Commission (FERC). That rule was issued to implement the statutory requirement of section 401 of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3391, to provide a high priority for the delivery of gas for agricultural purposes during times of gas shortage.

The rule which the FERC issued implemented the new priority system, but it also imposed, without explanation, a requirement that interstate pipelines amend their tariffs to provide for a specified method of allocating gas between (1) customers which have multiple sources of supply and (2) those which are fully dependent on the pipeline. As shown by uncontroverted testimony and evidence before the agency, that allocation requirement will result in the reduction of deliveries to higher priority

customers in some regions of the country in order to supply additional deliveries to lower priority customers in other regions.

The FERC's rule will allow pipelines to propose tariffs with allocation methodologies more appropriate to their systems, but they are required to obtain special permission from the FERC before they may implement those proposed tariffs.

This appeal raises the issue, central to the administration of the Natural Gas Act and at least six other regulatory statutes, whether the FERC may, by fiat and without explanation, bar the implementation of new tariffs filed under Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, until special permission is granted by the FERC to implement them. This appeal also raises the issue of the relationship of the new priorities established by Title IV of the NGPA and the requirement of the Natural Gas Act that natural gas allocation be implemented in a nondiscriminatory fashion.

Responsibility for administering the requirements of Section 401 was divided among three agencies. First, the Secretary of Agriculture was to identify and certify the natural gas requirements for "essential agricultural use." NGPA § 401(c), 15 U.S.C. § 3391(c). Second, the Secretary of Energy was directed to issue a rule providing that "to the maximum extent practicable," the provisions of a pipeline's tariff "may not provide for curtailment [reduction] of deliveries for any essential agricultural use" unless curtailment of such use is necessary to meet the requirements of, *inter alia*, high-priority users.[2] Section

[2] High-priority users are defined to include, *inter alia*, residences, commercial users, schools, and hospitals. Section 401(f).

401(a). Finally, the Federal Energy Regulatory Commission (FERC) was directed to "implement" the rule prescribed by the Secretary of Energy "pursuant to [the FERC's] authority under the Department of Energy Organization Act[3] to establish, review and enforce curtailments under the Natural Gas Act." NGPA § 403(b).

Numerous parties appealed various portions of the orders issued by the three agencies to the U.S. Court of Appeals for the D.C. Circuit. Louisiana challenged only certain portions of the orders issued by the FERC, and jurisdiction was established by Louisiana in the D.C. Circuit under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b) and under Section 506 of the NGPA, 15 U.S.C. § 3416.

The questions presented to the court below by Louisiana were (a) whether the Federal Energy Regulatory Commission, in implementing the Secretary's rule, had exceeded its power "under the Natural Gas Act" to "establish, review, and enforce curtailments" by imposing a special permission requirement on the implementation of new tariffs when that requirement is inconsistent with the maximum suspension period permitted by Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, and (b) whether the Federal Energy Regulatory Commission was correct that the mandate of the NGPA to establish new protection for essential agricultural users relieved it of the requirement of the Natural Gas Act, as interpreted by the courts, to administer curtailment according to the substantive standard of Section 4(b) of the

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[3] The Department of Energy Organization Act, 42 U.S.C. § 7101 *et seq*, transferred to the FERC much of the authority over natural gas curtailments which had previously been exercised by the Federal Power Commission. 42 U.S.C. § 7172(E).

Natural Gas Act, which prohibits pipelines from granting any "undue advantage or preference" to any customer.

A. The Statutory Scheme Under The Natural Gas Act For Establishing, Enforcing, And Reviewing Curtailments

The manner in which a pipeline will allocate gas among its customers in a time of shortage is set out in the provisions of the tariff which the pipeline has on file with the Federal Energy Regulatory Commission. Those provisions are commonly known as the pipeline's "curtailment plan."

The NGPA establishes certain new curtailment priorities and requires that the FERC administer those priorities pursuant to its authority "under the Natural Gas Act." NGPA § 403(b), 15 U.S.C. § 3393(b).

The FERC's authority "under the Natural Gas Act" to implement and administer curtailment was defined by this Court in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 642 (1972). The Court held that the legal standard by which curtailment programs are judged under the Natural Gas Act is that of section 4(b) of the Natural Gas Act, 15 U.S.C. § 717c(b). That section prohibits pipeline companies from (l) "mak[ing] or grant[ing] any undue preference or advantage to any person . . . or (2) maintain[ing] any unreasonable difference in . . . service . . . as between classes of service." Procedurally, the Court found, the Natural Gas Act provides two mechanisms for administering and reviewing curtailments. The Commission may proceed under section 5 of the Natural Gas Act, 15 U.S.C. § 717d, to impose a change in a curtailment tariff already in effect. Alternatively, section 4 of the Act, 15 U.S.C. § 717c, allows the pipelines themselves to file proposed new tariffs, subject to Commission suspension, review, and modification.

Under section 4, a curtailment tariff filed by a pipeline will:

> go into effect in 30 days unless suspended by the Commission. If a filing is challenged or the [Commission] of its own motion deems it appropriate, it may suspend the amended tariff *for up to five months*, at the end of which time the amended tariff becomes effective pending completion of hearings.

FPC v. *Louisiana Power & Light Co.*, *supra*, 406 U.S. 621, 645 (1972) (emphasis added). In its opening brief to the Court of Appeals below, the FERC explained how it had used the section 4 procedures to administer curtailments:

> Beginning in the early 1970's, inadequate supplies of natural gas forced many interstate pipelines to reduce, or "curtail," deliveries of contracted or certificated volumes of natural gas to their customers. To cope with these shortages, the Federal Power Commission (predecessor to the Federal Energy Regulatory Commission) required every interstate pipeline to report whether the gas shortages would require curtailment (reduction) of its deliveries to its customers. Those pipelines anticipating a need to curtail deliveries were required to file revised tariffs to control deliveries to all customers pursuant to section 4 of the Natural Gas Act (15 U.S.C. § 717c). These tariffs, which are commonly known as curtailment plans, provide a mechanism for apportioning a shortfall among various customers when a pipeline's available natural gas supplies are inadequate to meet its contractual requirements.[4]

Parallel provisions to section 4 of the Natural Gas Act are found in at least six other regulatory statutes which

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[4] Brief for Respondent Federal Energy Regulatory Commission at 6-7 (footnotes omitted).

confer the power on an agency to regulate the rates and services of an industry. Each of those regulatory statutes, like the Natural Gas Act, permits the regulated entity to file proposed new tariffs setting forth changes in its rates or conditions of service. Each statute, in parallel provisions to section 4, allows the agency to suspend the tariff for a maximum period of time which is specifically set forth in the statute. If the agency review is not completed by the end of the suspension period, the tariff may be placed into effect, while agency review is completed. Such parallel provisions are found in (l) Interstate Commerce Act (rail rates), 49 U.S.C. § 10707 (maximum five month suspension), (2) Interstate Commerce Act (non-rail carriers), 49 U.S.C. § 10708 (maximum seven month suspension), (3) Federal Power Act, 16 U.S.C. § 824(e) (maximum five month suspension), (4) Communications Act, 47 U.S.C. § 204(a) (maximum five month suspension), (5) Shipping Act, 46 U.S.C. § 817(c)(4) (maximum 180 day suspension), (6) Postal Reorganization Act of 1970, 39 U.S.C. §§ 3624, 3641 (maximum ten month suspension).

B. The Two Elements Of The Curtailment Tariffs Filed And Implemented Under The Natural Gas Act—An Order Of Priorities And An Allocation Mechanism.

In its brief to the *en banc* court below, the Commission also explained in general terms the nature of the curtailment programs filed under the Natural Gas Act:

> In the early 1970's, the Commission began administering curtailment plans filed as tariffs by natural gas pipelines under section 4 of the Natural Gas Act, 15 U.S.C. § 717c. . . . Generally speaking, these curtailment plans have two basic elements: (l) a scheme of priorities based on the "end" use of the gas and (2) a method of allocating the gas among the pipeline's customers. *State of North Carolina* v.

> *FERC*, 548 F.2d 1003, 1007 (D.C. Circuit 1978). These curtailment plans were approved by the Commission on an adjudicatory (pipeline-by-pipeline) basis.[5]

Generally, "scheme of priorities" in the plans were arranged according to the "end use" of the gas. An "end use" curtailment plan ranks "various uses of natural gas . . . according to their essentiality or desirability, and allocation is first made to the highest priority use, then if supplies are sufficient, to the next highest use, and so on down the line until supplies are exhausted." *North Carolina* v. *FERC*, 584 F.2d 1003, 1007 (D.C. Cir. 1978). The object of an end use plan is "to ensure that higher priority uses are completely supplied before lower priority uses are served." *North Carolina* v. *FERC*, 584 F.2d at 1007.

The two elements of an end use plan—the order of priorities and the method of allocation—were identified by the D.C. Circuit in *North Carolina*.

> It is clear that a successful "end use" plan must have two elements: first, a priority ranking of particular end uses from highest to lowest and, second, an allocation mechanism for assuring that higher-priority uses are protected from curtailment ahead of lower priority uses. The first of these elements is relatively easy to devise. It is only necessary to classify the various uses of natural gas and then to rank these uses in order of priority. *The second element of an "end use" plan—the allocation mechanism designed to ensure high priority use ahead of low priority use—is somewhat more difficult.*

North Carolina v. *FERC*, 584 F.2d at 1007 (emphasis supplied).

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[5] Brief for Respondent Federal Energy Regulatory Commission on Petition for Rehearing En Banc of Section 1-C of the Court's July 29, 1981 Opinion, filed March 16, 1982 at 3.

The allocation mechanism, as the court in *North Carolina* found, is the heart of a curtailment plan. It is of the highest importance when a pipeline serves some customers which are fully dependent on the pipeline and other customers which have multiple sources of supply. If the allocation mechanism is faulty, the order of priorities will not be served as intended. The panel opinion below in this case recognized that an inappropriate allocation mechanism could easily result in the curtailment of high priority customers for the benefit of lower priority customers (A.30 n.15).

C. The End Use Requirements Established By Congress In The NGPA.

The Congress, in section 401 of the NGPA, established by statute two categories of higher priority uses which must be "completely supplied before lower priority uses are served." The Congress did not, however, attempt to specify any particular allocation mechanism to be used to ensure that the high priority end uses it identified actually would be protected on the systems of particular pipelines.

As directed by the statute, the Secretary of Energy prescribed a rule which, like the statute, addressed only the "first element" of the end use program required by Congress. The Secretary ordered interstate pipelines to realign their priority rankings of end uses to comply with the priority ranking specified by the NGPA. The Secretary's rule, like the statute, did not attempt to impose any particular allocation mechanism on the pipelines. 10 C.F.R. Part 580, 44 Fed. Reg. 15642 (March 15, 1979).

D. The Actions Of The FERC To Implement The Secretary's Rule

The FERC issued Order Nos. 29 and 29-C to implement the Secretary's rule. As required by the Secretary's

rule and section 401, the FERC orders directed the interstate pipelines to file new curtailment plans containing the new order of end use priorities established by the NGPA. The FERC went further, however. It also ordered the pipelines to provide in their tariffs for the use of a specified allocation mechanism for dividing gas between customers which are wholly dependent on the curtailing pipeline and those which are only partially dependent. The panel of the Court of Appeals (A. 28) correctly described the working of the Order No. 29 allocation mechanism:[6]

> The rule provides that each pipeline is responsible for supplying a proportion of the customer's high priority gas needs equal to the pipeline's percentage contribution to the customer's total needs during the base period.

In the administrative proceedings before the agency, Louisiana had submitted specific evidence to show that the allocation mechanism prescribed by Order No. 29 would, under foreseeable supply conditions, cause Louisiana's pipeline supplier to curtail high priority and essential agricultural users in Louisiana in order to supply gas to lower priority users in other parts of the country. That evidence was not disputed by the FERC. The FERC, in fact, provided no discussion of the impact of the mechanism it prescribed or of the rationale for requiring it. The Order No. 29 allocation mechanism was imposed by fiat, without discussion, without evidentiary findings,

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[6] The allocation mechanism prescribed by Order No. 29 is defined by the combined operation of §§ 281.204, 281.205(b), 281.208, and 281.209 (A.210-31). A technical change was made to § 281.209 in Order No. 29-C, but the change made by Order No. 29-C did not alter the workings of the allocation mechanism as correctly described by the panel of the Court of Appeals.

and without any findings that it was necessary or even appropriate to achieve the purposes of section 401.[7]

The FERC did state that it would, in specific cases, grant "adjustments" to the allocation mechanism required by the rule and that it would consider requests for such adjustments in proceedings held under section 502(c) of the NGPA, 15 U.S.C. § 3412(c). That section allows the agency to grant adjustments to any rules issued under the NGPA "as may be necessary to prevent special hardship, inequity, or an unfair distribution of burdens."

On rehearing before the agency, Louisiana objected that the rule was unlawful in that it purported to bar pipelines from filing, under section 4 of the Natural Gas Act, tariff provisions setting out alternate allocation mechanisms if those provisions would better serve the purposes of the NGPA under the particular circumstances affecting their systems. In response, the Commission stated that it would permit the filing of such tariffs but that it would bar their implementation for an indefinite period of time unless and until the Commission had granted special permission (an "adjustment") for the filings to be implemented. Order No. 29-C thus states that:

> Order No. 29 is a rule and it requires 37 named interstate pipelines to implement § 401 in a particular and detailed manner. Interstate pipelines may file plans under section 4 of the Natural Gas Act that deviate from Order No. 29. But such a filing by itself

[7] The opinion of the Court of Appeals does not discuss or describe the rationale of the agency for imposing the allocation mechanism selected. The court could not have done so because the agency did not provide a rationale.

> would not waive the requirement to file in accordance with Order No. 29 *unless* the pipeline has received an adjustment under § 502(c). *A deviant plan filed under section 4 of the NGA cannot go into effect until the requirements of Order No. 29 have been waived.* [Emphasis supplied][8]

E. Proceedings In The Court Of Appeals

On appeal to the D.C. Circuit, Louisiana and other parties[9] argued that, in acting by fiat to block the implementation of filed tariffs for a period which could easily be longer than the maximum five-month period permitted by statute, the FERC had asserted powers denied it by the Natural Gas Act. Those parties also objected that the allocation mechanism required by the FERC would cause unlawful discrimination under section 4(b) of the Natural Gas Act when applied to some pipelines. Finally, those parties objected to the FERC's abandonment of the nondiscrimination standard of section 4(b) and the substitution instead of the new and less specific "special hardship, inequity, or unfair distribution of burdens" standard of section 502(c) of the NGPA.

The panel of the D.C. Circuit, in part I.C. of its Opinion (A.28-35), found the Commission itself to be aware that the allocation mechanism required by Order No. 29 "might not be the most appropriate rule in all circumstances" (A.32). But the panel expressed confidence that the Commission, when enforcing the rule "in a particular situation" will be sensitive to the needs and requirements of particular pipelines (A.33-34). The panel upheld the "facial validity" (A.30) of the rule because it found that

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[8] A.292

[9] Including United Gas Pipe Line Company, Entex, Inc., Air Products and Chemicals, Inc., Stauffer Chemical Company, and Willamette Industries, Inc.

the Commission had provided adequate procedures for "adjustments" to the rule.

In response to the argument that the Commission's rule was inconsistent with the five month suspension period provided for by section 4 of the Natural Gas Act, the panel stated that the Commission was "free to announce constraints on tariff filings in the form of rules." For that proposition, the only statutory authority cited by the court was the Commission's general rulemaking power under section 16 of the Natural Gas Act, 15 U.S.C. § 717o and under the Department of Energy Organization Act, section 402(h),42 U.S.C. § 7172(h).

On rehearing *en banc*, the full D.C. Circuit announced that it had "decided to adopt Part I.C of the panel opinion as the opinion of the *en banc* court" (A. 116 n.3). The *en banc* court thus reaffirmed as its own the conclusion of the panel that the Commission's general rulemaking powers under the Natural Gas Act and the Department of Energy Organization Act permit it to delay indefinitely, while an adjustment request is pending, the implementation of a filed tariff. The *en banc* court then went on to say that:

> Thus, we adopt the panel's view that the Commisson's specific grants of authority under sections 401, 402, 501, and 502 of the NGPA control over the general requirements of sections 4 and 5 of the Natural Gas Act, 15 U.S.C. sections 717c, d. In doing so, we accept the Commission's position that section 502(c) of the NGPA, 15 U.S.C. § 3412(c) is an appropriate mechanism for correcting any inequities in specific plans that follow from application of its generic rule. . . . Absent a ripe case or controversy regarding the application of section 502(c), however, we will refrain from expressing an opinion as to whether our decision in *North Carolina* v. *FERC*, 584 F.2d 1003, 1012 (D.C. Cir. 1978), delineates the

scope of the Commission's authority in a section 502(c) proceeding.

REASONS FOR ALLOWING THE WRIT

Review by this Court of the *en banc* decision of the D.C. Circuit is necessary for two reasons:

1. The D.C. Circuit, *en banc*, has affirmed a rule of a regulatory agency which will suspend, without explanation, the implementation of filed tariffs for a period beyond the statutory suspension period set by law. In so doing, the *en banc* D.C. Circuit has thrown a previously settled body of regulatory law into disarray. The D.C. Circuit's decision conflicts directly with prior holdings of the Second Circuit and of the D.C. Circuit itself. The decision is also inconsistent with the reasoning of prior opinions of this Court.

2. In deciding that "specific" grants of authority under the NGPA control over "general" requirements of the Natural Gas Act, the *en banc* D.C. Circuit has found a conflict between the requirements of two important statutes where no conflict need exist. The D.C. Circuit's *en banc* decision thus raises fundamental questions about the relationship of the two principal statutes governing the natural gas industry. The answers to those questions will govern the pattern of deliveries to millions of gas consumers across the nation, and they should be addressed by this Court.

A. The En Banc Ruling Of The D.C. Circuit That The FERC May Use Its General Rulemaking Powers To Extend Indefinitely The Five Month Suspension Period Established By Section 4 Of The Natural Gas Act Conflicts Directly With An Opinion Of The Second Circuit And With Prior Decisions Of The D.C. Circuit, And It Is Inconsistent In Reasoning With Prior Opinions Of This Court On An Important Issue Of Law Affecting The Administration Of At Least Seven Regulatory Statutes.

The Natural Gas Act, like at least six other regulatory statutes,[10] provides that a regulated entity may initiate changes in its tariff by providing notice of the proposed change to the Commission. Under section 4 of the Natural Gas Act, the filed tariff will go into effect in 30 days unless it is suspended by the Commission. The Commission may suspend the tariff change for a period of up to five months while it reviews the proposed change. At the end of the five-month suspension period, the amended tariff becomes effective pending completion of hearings and administrative proceedings. *See FPC* v. *Louisiana Power & Light Co.*, *supra*, 406 U.S. 621, 645 (1972). Parallel provisions are found in the other six statutes. Until the decision of the D.C. Circuit in this case, every court which has considered the issue—whether under the National Gas Act or under the other statutes—has found that an agency is without power to suspend or delay the implementation of a filed tariff for a period longer than the maximum suspension period set by law unless the agency has, by the end of that period, completed proceedings and made necessary findings that the filed tariff is unduly discriminatory, or otherwise unlawful.[11] *See e.g.*, *United*

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[10] Listed *supra* at 8.

[11] An exception to that principle, not relevant here, occurs when the Commission has conducted proceedings under section 5 of the Act to prescribe a rate or practice, based on "substantial evidence in the

States v. *Scrap*, 412 U.S. 669, 697 (1973) (Interstate Commerce Act), *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, 661-67 (1963) (Interstate Commerce Act), *Willmut Gas and Oil Company* v. *FPC*, 294 F.2d 245, 248-49 (D.C. Circuit 1961), *cert. denied* 368 U.S. 975 (1962), *American Telephone & Telegraph Co.* v. *FCC*, 487 F.2d 865 (2nd Cir. 1973), *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365, 375 (D.C. Cir. 1977), *cert. denied* 434 U.S. 1040 (1978) (Communications Act), *Indiana and Michigan Electric Co.* v. *FPC*, 502 F.2d 336 (D.C. Cir. 1974), *cert. denied* 420 U.S. 948 (Federal Power Act).

In the orders under review in this case, the Commission (l) purported to bar indefinitely the implementation of tariffs which contained allocation mechanisms deviating from the one required by Order No. 29 unless and until the Commission had granted special permission for the tariffs to go into effect and (2) did so without first making any finding that the allocation mechanism it prescribed by the rule is necessary or appropriate to achieve the purposes of section 401 of the NGPA. The Commission issued the order, in fact, in the face of evidence provided to the record showing that, in some circumstances, the allocation mechanism required will have

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record," American Smelting & Refining Co. v. FPC, 494 F.2d 925, 933 (D.C. Cir. 1974), *cert. denied* 419 U.S. 882(1974). In such a case a moratorium on section 4 filings may be upheld to preserve the effectiveness of the Commission's actions under section 5. *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). The Commission has conceded that in this case it has made no attempt to follow the requirements of section 5 (A.293). Its allocation mechanism was imposed without any assessment of its impact and without any finding that it was needed or appropriate.

totally inappropriate results. (*See* discussion of the panel at A.30 n. 15).

In affirming the Commission on this point, the panel cited no statutory authority other than the Commission's general rulemaking power under section 16 of the Natural Gas Act and Section 402(b) of the Department of Energy Organization Act.[12] The panel's decision, which was adopted as its own by the *en banc* court, conflicts squarely with a number of other leading decisions.

The Second Circuit, construing parallel provisions of the Communications Act of 1934, 47 U.S.C. §§ 151 *et. seq.*, conducted a painstaking analysis of the relationship between the tariff filing provisions of the Communications Act and the powers of the Federal Communications Commission under its general rulemaking authority. *American Telephone & Telegraph Co.* v. *FCC*, *supra*, 487 F.2d 865, 876-80 (2d Cir. 1973). In that case, on facts similar to this case, the Second Circuit struck down an order of the FCC which barred the filing and implementation of new tariffs until the Commission had granted "special permission" for them to be filed. The Second Circuit held that the rulemaking authority of the FCC did not authorize it to require a carrier to seek "special permission" before filing a new tariff. Construing parallel

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[12] Section 16 of the Natural Gas Act 15 U.S.C. § 717o, authorizes the Commission to make such rules "as it may find necessary or appropriate to carry out the provisions of this chapter." Section 402(h) of the Department of Energy Organization Act, 42 U.S.C § 7172(h) is likewise but a grant of general authority to prescribe rules "with respect to" FERC's functions. Neither provision authorizes the agency to overlook the statutory five month limitation on the suspension period.

provisions of the Communications Act, the Second Circuit said:

> What is determinative in the instant case is the incontrovertible fact that the special permission provision under review had the same effect as a Section 205 rate prescription. It compels the carrier to adhere to a fixed rate which can be revised only with prior Commission permission. Section 205 provides, however, that before the Commission can exercise that authority, hearings must be held and the prescribed rates must be found just and reasonable. To permit the Commission to achieve the same result as it would pursuant to a Section 205 rate prescription, by circumventing the statutory hearing and finding requirements on the basis of its claimed broad inherent regulatory power would defeat the purpose of Section 205 and vitiate the specific statutory scheme. . . . *There is no regulatory authority granted to the Commission by virtue of its power to regulate the communications and broadcasting industries which permits it to circumvent the statutory plan of carrier initiated rate changes, a limited suspension period, rate refunds, and rate prescriptions only after a full hearing and specific findings.*

American Telephone & Telegraph Co. v. *FCC*, *supra*, 487 F.2d at 874-75 (emphasis supplied).

A panel of the D.C. Circuit later followed the reasoning of the *American Telephone & Telegraph* case in *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365, 375 (D.C. Cir. 1977), *cert. denied* 434 U.S. 1040 (1978):

> In enacting Sections 203-05 of the Communications Act [parallel provisions to Sections 4 and 5 of the Gas Act], Congress intended a specific scheme for carrier initiated rate [tariff] revisions. A balance was achieved after careful compromise. The Commission is not free to circumvent or ignore that balance. Nor may the Commission in effect rewrite the statutory

> scheme on the basis of its own conception of the equities of a particular situation.

(Footnote omitted, emphasis supplied.)

An earlier decision of a panel of the D.C. Circuit, *Willmut Gas & Oil Company* v. *FPC*, 294 F.2d 245, 250 (1961), *cert. denied*, 368 U.S. 975 (1962), likewise held that the Commission's general rulemaking powers do not by themselves:

> Authorize an order, rule, or regulation which would nullify or restrict the right of a natural gas company to change the rates [tariffs] under which it offers to furnish service, subject only to the requirement of section 4(b) of the Act that it notify the Commission of the changes so that it may proceed under section 4(e).

The D.C. Circuit's decision in this case is also inconsistent with the reasoning of prior decisions of this Court which have found that the maximum suspension period represents a deliberate balancing of interests by the Congress which may not be modified by the Commission or even by the courts. *United States* v. *SCRAP*, 412 U.S. 669, 697, (1973); *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963).

As additional support for its conclusion that the Commission had acted properly in barring the implementation of section 4 filings which set out allocation mechanisms different from that required by the rule, the panel (A. 35 n. 28) relied on three cases decided under the Natural Gas Act: *Permian Basin Area Rate Cases*, 390 U.S. 747, 781 (1968), *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 39 (1964), and *Pacific Gas & Electric Co.* v. *FPC*, 506 F.2d 33, 41 (D.C. Cir. 1974). Those cases provide no additional basis to support the departure from previously settled precedent which the D.C. Circuit has made in this case. In *Permian*,

a limited (two-and-one-half year) moratorium on future filings for rate increases was upheld as a valid exercise of the Commission' power under *section 5* of the Natural Gas Act. (*See* note 11, *supra*). As the Second Circuit has explained:

> In Permian, however, the moratorium was invoked after the FPC had prescribed agency made rates pursuant to section 5(a) of the Natural Gas Act. The Court in sustaining the moratorium expressly relied upon this prescription authority. 390 U.S. at 778-79. This is a far cry from the Commission's claimed authority to impose the special permission requirement in the instant case. . . .

American Telephone & Telegraph Co. v. *FCC*, 487 F.2d 864 at 888.

The Commission's power to "particularize statutory standards" through the rulemaking process, acknowledged in *FPC* v. *Texaco*, is not relevant to a case in which the Commission has prescribed, in advance, a particular curtailment allocation mechanism without even making findings that that mechanism is necessary or appropriate to achieve the statutory objectives. Finally, the Commission's acknowledged ability to proceed by rulemaking rather than by case-by-case adjudication does not relieve it of its obligation to honor the Natural Gas Act procedures, to analyze the effect of its rule under section 5 of the Natural Gas Act, and to provide "a reasoned opinion detailing those factual elements in the record that underlie the Commission's actions." *Public Systems* v. *FERC*, 606 F.2d 973. (D.C. Cir. 1979) (footnote omitted). None of those requirements were met in this case.

In adopting Part I.C. of the panel's opinion, the Court *en banc* stated that "we adopt the panel's view that the Commission's specific grants of authority under sections 401, 402, 501, and 502 of the NGPA control over the

general requirements of Sections 4 and 5 of the Natural Gas Act," 15 U.S.C. §§ 717c, d. It is doubtful that, by that sentence, the Court intended to supply additional authority on the suspension period issue beyond that supplied by the brief discussion in the panel opinion. In the portion of its opinion which discussed the Commission's power to bar the implementation of tariffs filed under section 4, the panel did not cite sections 401, 402, 501 and 502 of the NGPA, and, by their terms, those sections provide no additional procedural authority for the use of the Commission in implementing curtailments "under the Natural Gas Act."[13]

By affirming the Commission's authority to block indefinitely the pipelines from implementing new tariffs filed under Section 4 of the Natural Gas Act, without first

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[13] Section 401 defines the new curtailment priorities for essential agricultural users and high priority users. It adds no new procedural powers. Section 402 creates a new statutory priority for "process and feedstock" users. It is not relevant to the issues in this case and, like section 401, provides no new procedural powers. Section 501 provides only a general rulemaking authority to the Commission "to prescribe, issue, amend and rescind such rules and orders as it may find necessary or appropriate to carry out its functions under this Act." Like the comparable language in Section 16 of the Natural Gas Act, 15 U.S.C. § 717o, and in the other regulatory statutes, it is a "housekeeping" provision which "does not enlarge the powers of the Commission conferred elsewhere in the Act." Alaska Bulk Carriers Inc. v. Kreps, 595 F.2d 814, 835 n. 108 (D.C. Cir. 1979), *reversed on other grounds*, 442 U.S. 572 (1979) (construing provisions of the Natural Gas Act). Section 502 provides for additional administrative procedures, not relevant here,and it authorizes the Commission to grant adjustments to its rules. The *en banc* court could not have intended to mean that any of those general provisions are "specific" provisions of the NGPA which override the specific limitation on the suspension period established by the Natural Gas Act.

having made a finding that such action is necessary or required to achieve the purposes of the Natural Gas Policy Act, the opinion of the D.C. Circuit *en banc* is so at variance with all other precedent that it approaches plain error. The D.C. Circuit's *en banc* decision confuses and upsets a previously settled body of regulatory law under the Natural Gas Act and other important regulatory statutes. It should therefore be reviewed and corrected by this Court.

B. The Opinion Of The En Banc Court Below Decides Incorrectly The Important Question Of The Relationship Of The Two Statutes Which Govern Natural Gas Curtailments, And The Resolution Of That Question Will Affect The Gas Supplies And Costs Of Millions Of Gas Consumers Across The Nation.

In affirming the Commission, the D.C. Circuit *en banc* wrote that "we adopt the panel's view that the Commission's specific grants of authority under Sections 401, 402, 501, and 502 of the NGPA control over the general requirements of sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c, 717d." By that statement, the court seems to find (a) a conflict between the "specific" requirements of one statute and the "general" requirements of the other and (b) the need to reconcile the conflict by causing the provisions of one statute to yield to the provisions of the other. In fact, no conflict, either substantive or procedural, should be found.

Procedurally, the NGPA, by its terms, requires the Commission to implement the requirements of Title IV of the NGPA using its authority "under the Natural Gas Act." NGPA § 403(b). The language of the NGPA permits no procedural conflict between the two statutes.

Substantively, the standard which governs curtailment under the Natural Gas Act is that of Section 4(b),

which provides that no natural gas company shall make or grant any "undue preference or advantage" or "maintain any unreasonable difference" in service. *FPC* v. *Louisiana Power & Light Co.*, *supra*, 406 U.S. 621 (1972). The requirement of the NGPA that curtailment priority schedules be modified need not be inconsistent with the requirement of Section 4(b) that *any* curtailment priority schedule be implemented in a way which does not cause any "undue preference or advantage." There is no necessary conflict there.

In presentations to the agency, and in its brief to the Court of Appeals, Louisiana showed that the allocation mechanism prescribed by Order No. 29, if applied to some pipelines, would result in unlawful discrimination under Section 4(b), as that section has been interpreted by the courts. *E.g.*, *North Carolina* v. *FERC*, 584 F.2d 1003, 1012 (D.C. Cir. 1978); *Sebring Utilities Commission* v. *FERC*, 591 F.2d 1003, 1012 n. 32 (5th Cir. 1979), *cert. denied* 444 U.S. 879 (1979); *City of Wilcox* v. *FPC*, 567 F.2d 394, 410-411 (D.C. Cir. 1977), *cert. denied* 434 U.S. 1012 (1978). In the orders under review, the FERC explained that it does not believe itself bound by "the standards which have historically controlled determinations of lawfulness of curtailment plans under the NGA" (A. 146). Specifically the Commission believed that it was no longer bound, as it was required to do under the Natural Gas Act, to "consider the different impacts of the plan on full and partial requirements customers" because the requirements of the Natural Gas Policy Act are "superimposed" upon the Natural Gas Act standards (A. 146). On rehearing, in Order No. 29-C, the FERC reaffirmed that "the Commission does not believe that *North Carolina* [the interpretation of Section 4(b) given by the D.C. Circuit] controls this rulemaking" (A. 293-94).

In affirming the Commission, the D.C. Circuit *en banc* agreed with the Commission that:

> Section 502(c) of the NGPA is an appropriate mechanism for correcting any inequities in specific plans that follow from application of the generic rule. By its terms, Section 502(c) allows for adjustments "as may be necessary to prevent *special hardship, inequity, or unfair distribution of burdens.* 15 U.S.C. § 3412 [emphasis by the court].

The "special hardship, inequity, or unfair distribution of burdens" standard is a different standard from the "undue preference or advantage" standard of the Natural Gas Act. The Natural Gas Act standard by now benefits from an extensive judicial gloss in the context of curtailments. The section 502(c) standard, by contrast, is new and undefined. Whether the non-discrimination standards of the Natural Gas Act have now been replaced by a "special hardship, inequity, or unfair distribution of burdens" standard is an important legal issue, with enormous practical implications, which should be decided by this Court. The answer to that question will govern gas deliveries and costs to millions of consumers throughout the nation.

CONCLUSION

For the foregoing reasons, Louisiana respectfully requests that the writ of certiorari be allowed.

Respectfully submitted,

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January 28, 1983

STATUTES:

Natural Gas Act Sections 4, 5, 16, 15 U.S.C. §§ 717c, d, o 1a

Natural Gas Policy Act of 1978, Sections 401, 402, 403, 501, 502, 15 U.S.C. §§ 3391, 3392, 3393, 3411, 3412 5a

Department of Energy Organization Act, Section 402(a), (h) 42 U.S.C § 7172(a), (h) 11a

Natural Gas Act Sections 4, 5, 16; 15 U.S.C. §§ 717c, d, o

Section 4, 15 U.S.C. § 717c

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be

made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to

refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5, 15 U.S.C. § 717d

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural-gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule.

Section 16, 15 U.S.C. § 717o

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified

therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

Natural Gas Policy Act §§ 401, 402, 403, 501, 502; 15 U.S.C. §§ 3391, 3392, 3393, 3411, 3412

Section 401, 15 U.S.C. § 3391

Natural Gas For Essential Agricultural Uses

(a) General rule. Not later than 120 days after November 9, 1978, the Secretary of Energy shall prescribe and make effective a rule, which may be amended from time to time, which provides that, notwithstanding any other provision of law (other than subsection (b) of this section) and to the maximum extent practicable, no curtailment plan of an interstate pipeline may provide for curtailment of deliveries of natural gas for any essential agricultural use, unless such curtailment—

(1) does not reduce the quantity of natural gas delivered for such use below the use requirement specified in subsection (c) of this section; or

(2) is necessary in order to meet the requirements of high-priority users.

(b) Curtailment priority not applicable if alternative fuel available. —If the Commission, in consultation with the Secretary of Agriculture, determines, by rule or order, that use of a fuel (other than natural gas) is economically practicable and that the fuel is reasonably available as an alternative for any agricultural use of natural gas, the provisions of subsection (a) if this section shall not apply with respect to any curtailment of deliveries for such use.

(c) Determination of essential agricultural use requirements. —The Secretary of Agriculture shall certify to the Secretary of Energy and the Commission the natural gas requirements (expressed either as volumes or percentage of use) of persons (or classes thereof) for essential agricultural uses in order to meet the requirements of full food and fiber production.

(d) Authority of Secretary of Agriculture to intervene. —The Secretary of Agriculture may intervene as a matter of right in any proceeding before the Commission which is conducted in connection with implementing the requirements of the rule prescribed under subsection (a) of this section.

(e) Limitation. —The Secretary of Agriculture may not exercise any authority under this section for the purpose of restricting the production of any crop.

(f) Definitions. —For purposes of this section—

(1) Essential agricultural use. —The term "essential agricultural use", when used with respect to natural gas, means any use of natural gas—

(A) for agricultural production, natural fiber production, natural fiber processing, food processing, food quality maintenance, irrigation pumping, crop drying, or

(B) as a process fuel or feedstock in the production of fertilizer, agricultural chemicals, animal feed, or food,

which the Secretary of Agriculture determines is necessary for full food and fiber production.

(2) High-priority user. The term "high-priority user" means any person who—

(A) uses natural gas in a residence;

(B) uses natural gas in a commercial establishment in amounts of less than 50 Mcf on a peak day;

(C) uses natural gas in any school, hospital, or similar institution; or

(D) uses natural gas in any other use the curtailment of which the Secretary of Energy determines would endanger life, health, or maintenance of physical property.

Section 402, 15 U.S.C. § 3392

Natural Gas For Essential Industrial Process And Feedstock Uses

(a) General rule. —The Secretary of Energy shall prescribe and make effective a rule which provides that, notwith-

standing any other provision of law (other than subsection (b) of this section) and to the maximum extent practicable, no interstate pipeline may curtail deliveries of natural gas for any essential industrial process or feedstock use, unless such curtailment—

(1) does not reduce the quantity of natural gas delivered for such use below the use requirement specified in subsection (c) of this section;

(2) is necessary in order to meet the requirements of high-priority users; or

(3) is necessary in order to meet the requirements for essential agricultural uses of natural gas for which curtailment priority is established under section 3391 of this title.

(b) Curtailment priority applicable only if alternative fuel not available. —The provisions of subsection (a) of this section shall apply with respect to any curtailment of deliveries for any essential industrial process or feedstock use only if the Commission determines that use of a fuel (other than natural gas) is not economically practicable and that no fuel is reasonably available as an alternative for such use.

(c) Determination of essential industrial use requirements. —The Secretary of Energy shall determine and certify to the Commission the natural gas requirements (expressed either as volumes or percentages of use) of persons (or classes thereof) for essential industrial process and feedstock (other than those referred to in section 3391(f)(1)(B) of this title).

(d) Definitions. —For purposes of this section—

(1) Essential industrial process or feedstock use. —The term "essential industrial process or feedstock use" means any use of natural gas in an industrial process or as a feedstock which the Secretary determines is essential.

(2) High-priority user. —The term "high-priority user" has the same meaning as given such term in section 3391(f)(2) of this title.

Section 403, 15 U.S.C. § 3393

§ 3393.

(a) Establishment of priorities. —The Secretary of Energy shall prescribe the rules under sections 3391 and 3392 of this title pursuant to his authority under the Department of Energy Organization Act to establish and review priorities for curtailments under the Natural Gas Act.

(b) Implementation of priorities. —The Commission shall implement the rules prescribed under sections 3391 and 3392 of this title pursuant to its authority under the Department of Energy Organization Act to establish, review, and enforce curtailments under the Natural Gas Act.

Section 501, 15 U.S.C. § 3411

General rulemaking authority

(a) In general. —Except where expressly provided otherwise, the Commission shall administer this chapter. The Commission, or any other Federal officer or agency in which any function under this chapter is vested or delegated, is authorized to perform any and all acts (including any appropriate enforcement activity), and to prescribe, issue, amend, and rescind such rules and orders as it may find necessary or appropriate to carry out its functions under this chapter.

(b) Authority to define terms. —Except where otherwise expressly provided, the Commission is authorized to define, by rule, accounting, technical, and trade terms used in this chapter. Any such definition shall be consistent with the definitions set forth in this chapter.

(c) Delegation of certain determinations. —The Commission may delegate to any State agency (with the consent of such agency) any of its functions with respect to sections 3315, 3316(b), and 3319(a)(1) and (3) of this title.

Section 502, 15 U.S.C. § 3412

§ 3412. Administrative procedure

(a) Administrative Procedure Act. —Subject to subsection (b) of this section, the provisions of subchapter II of chapter 5 of Title 5 shall apply to any rule or order issued under this chapter having the applicability and effect of a rule as defined in section 551(4) of Title 5; except that sections 554, 556, and 557 of such Title 5 shall not apply to any order under such section 3361, 3362, or 3363 of this title.

(b) Opportunity for oral presentations. —To the maximum extent practicable, an opportunity for oral presentation of data, views, and arguments shall be afforded with respect to any proposed rule or order described in subsection (a) of this section (other than an order under section 3361, 3362, or 3363 of this title). To the maximum extent practicable, such opportunity shall be afforded before the effective date of such rule or order. Such opportunity shall be afforded no later than 30 days after such date in the case of a waiver of the entire comment period under section 553(d)(3) of Title 5, and no later than 45 days after such date in all other cases. A transcript shall be made of any such oral presentation.

(c) Adjustments. —The Commission or any other Federal officer or agency authorized to issue rules or orders described in subsection (a) of this section (other than an order under section 3361, 3362, or 3363 of this title) shall, by rule, provide for the making of such adjustments, consistent with the other purposes of this chapter, as may be necessary to prevent special hardship, inequity, or an unfair distribution of burdens. Such rule shall establish procedures which are available to any person for the purpose of seeking an interpretation, modification, or rescission of, exception to, or exemption from, such applicable rules or orders. If any person is aggrieved or adversely affected by the denial of a request for adjustment under the preceding sentence, such person may request a review of such denial by the officer or agency and may obtain

judicial review in accordance with section 3416 of this title when such denial becomes final. The officer or agency

shall, by rule, establish procedures, including an opportunity for oral presentation of data, views, and arguments, for considering requests for adjustment under this subsection.

(d) Procedures applicable for incremental pricing determinations respecting imports. —Notwithstanding the preceding provisions of this section, any determination made under section 3347(c) of this title shall be made in accordance with the procedures applicable to the granting of any authority under the Natural Gas Act to import natural gas or liquefied natural gas (as the case may be).

Department of Energy Organization Act, § 402(a), (h), 42 U.S.C. § 7172(a), (h)

Jurisdiction of Commission

Transfer of functions from Federal Power Commission

(a)(1) There are hereby transferred to, and vested in, the Commission the following functions of the Federal Power Commission or of any member of the Commission or any officer or component of the Commission:

(A) the investigation, issuance, transfer, renewal, revocation, and enforcement of licenses and permits for the construction, operation, and maintenance of dams, water conduits, reservoirs, powerhouses, transmission lines, or other works for the development and improvement of navigation and for the development and utilization of power across, along, from, or in navigable waters under part I of the Federal Power Act;

(B) the establishment, review, and enforcement of rates and charges for the transmission or sale of electric energy, including determinations on construction work in progress, under part II of the Federal Power Act, and the interconnection, under section 202(b), of such Act, of facilities for the generation, transmission, and sale of electric energy (other than emergency interconnection);

(C) the establishment, review, and enforcement of rates and charges for the transportation and sale of natural gas by a producer or gatherer or by a natural gas pipeline or natural gas company under sections 1, 4, 5, and 6 of the Natural Gas Act;

(D) the issuance of a certificate of public convenience and necessity, including abandonment of facilities or services, and the establishment of physical connections under section 7 of the Natural Gas Act;

(E) the establishment, review, and enforcement of curtailments, other than the establishment and review of priorities for such curtailments, under the Natural Gas Act; and

(F) the regulation of mergers and securities acquisition under the Federal Power Act and Natural Gas Act.

(2) The Commission may exercise any power under the following sections to the extent the Commission determines such power to be necessary to the exercise of any function within the jurisdiction of the Commission:

(A) sections 4, 301, 302, 306 through 309, and 312 through 316 of the Federal Power Act; and

(B) sections 8, 9, 13 through 17, 20, and 21 of the Natural Gas Act.

Rules, Regulations, And Statements Of Policy

(h) The Commission is authorized to prescribe rules, regulations, and statements of policy of general applicability with respect to any function under the jurisdiction of the Commission pursuant to this section.